INDEX

	Page
Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit	1
Names of Petitioners	1
Prayer for Writ	2
Jurisdiction	3
Summary and Short Statement of the Matter Involved	3
Allegations of Complaint	3
Declaration Requested of Court by Plaintiff	3
Answer and Counterclaim of Defendants	4
Travel Time stated in Complaint	4
Stipulation and Pretrial Order as to Issues Involved	5
Order of District Court	5
Opinion of District Court	6
Statement as to Operations of the Mines	6
Entry Into Mines	7
Articles Carried by all Underground Employees	7
Preportal Activities:	
(a) Machinemen	7
(b) Motormen and Brakemen	8
(c) Trackmen	8
(d) Bratticemen	8
(e) Wiremen	9
(f) Coal Loaders	9
(g) Services Continue in Transit	9
The underground Journey	9
Mantrips and their Operation	10
Underground Hazards	10
Walking Distances, Conditions and Dangers	12
Triptime and Paytime	12

Page

Decision of the District Judge Discussed..... 12
Questions Presented..... 13
Reasons for Granting the Writ..... 14
Affidavit of Counsel..... 17
Certificate of Counsel..... 17
Brief in Support of Petition..... 18
Appendix..... 20
Statute Involved..... 20
Order of District Court..... 21
Findings of Fact and Conclusions of Law..... 26

CASES

Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, et al., #409 March 27, 1944,____U. S.____

IN THE

Supreme Court of the United States

October Term 1943

Number.....

LOCAL No. 6167
UNITED MINE WORKERS OF AMERICA,
AN UNINCORPORATED ASSOCIATION
AFFILIATED WITH THE INTERNATIONAL
UNION, UNITED MINE WORKERS
OF AMERICA, ET AL.,

Petitioner.

Versus

JEWELL RIDGE COAL CORPORATION,
A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices Of The Supreme Court Of The United States:—

The petitioners are as follows: Local No. 6167, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; Harlan Hampton, President, John A. White, Vice President, Omer Ketron, Recording Secretary, James W. Belcher, Financial

Secretary, C. M. Mathena, Treasurer, Tony Farnese, Door Keeper, Individually and as Officers of said Local No. 6167; Carl Altizer, Omer Ketron and T. V. White, Individually and as members of the Mine Committee of said Local No. 6167; H. D. Hampton, Tony Farnese, and James Al Smith, Individually and as members of the Safety Committee of said Local No. 6167; Local No. 7327, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; J. H. Sheppard, President, J. E. Collins, Vice President, Forrest Ritchie, Recording Secretary, Josh Keen, Financial Secretary, C. F. Clark, Treasurer, Lyss Patrick, Door Keeper, Individually and as Officers of said Local No. 7327; Josh Keen, J. A. White and Paul Sykes, Individually and as Members of the Mine Committee of said Local No. 7327; Walter Jackson, J. S. Walker and Glenn Crouse, Individually and as Members of the Safety Committee of said Local No. 7327; District No. 28, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; John Saxton, President and W. F. Minton, Secretary-Treasurer, Individually and as Officers of said District No. 28, and International Union, United Mine Workers of America, an unincorporated association and John L. Lewis, individually and as President of said International Union.

The petitioners pray that a Writ of Certiorari issue for the purpose of securing a removal to this Court of the case in which the petitioners are appellants in the Circuit Court of Appeals for the Fourth Circuit to review a judgment of the United States District Court for the Western District of Virginia, entered on the 25 day of January, 1944. Said Circuit Court of Appeals has not given a judgment or decree.

A transcript of the record in the case including the proceedings in said court, is furnished herewith in accordance with the rules of this Court.

JURISDICTION

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. A. Section 347, as amended by the Act of February 13, 1925.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

This case raises the question of portal-to-portal pay under the Fair Labor Standards Act of 1938 for underground employees in two coal mines of the Jewell Ridge Coal Corporation. That corporation brought a class action against the petitioners in the District Court of the United States for the Western District of Virginia asking for a declaratory judgment under the provisions of the Federal Declaratory Judgment Law, Title 28 U. S. C. A. Section 400, the Judicial Code, Section 274 (d).

The complaint alleged that the plaintiff had at all times effective wage agreements which provided that seven hours of labor should constitute a day's work and that the seven-hour day meant seven hours work in the mines at the usual working places.

The plaintiff asked the Court to declare among other things that:

"(a) Plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at the usual working places, exclusive of the lunch period and travel time, as provided in the effective wage agreements, and in paying its underground workers for their services on that basis, had complied with and

discharged the obligations imposed upon it by Section 7 of the Fair Labor Standards Act.

(b) Section 7 of the Act does not require that there be included within the workweek of underground workers in plaintiff's mines time spent in travel from the portal to their usual working places and return."

The petitioners herein, being all of the defendants in the action, filed a detailed answer to the complaint. The answer denied that there were any wage agreements covering the time subsequent to March 31, 1943. The answer further asserted that the underground employees of the plaintiff had been employed for workweeks longer than those prescribed in Section 7 of the Fair Labor Standards Act of 1938 and that they had not been paid therefor as required by the Act.

Those defendants who were underground employees of the plaintiff filed a counterclaim in behalf of themselves, and all other employees similarly situated, claiming for the entire period subsequent to the effective date of the Act the overtime compensation, the liquidated damages and the attorney's fee provided by the Act. Before the trial began, however, the underground employee defendants filed an amendment to their answer disclaiming all overtime compensation and liquidated damages except for the period April 1, 1943 to June 20, 1943.

The complaint alleged that the workers employed in the Jewell Ridge mine consumed on an average for each man approximately 88 minutes each working day in traveling from the mine portal to the usual working places and thence back to the mine portal, and in like manner the workers employed in plaintiff's Jewell Valley mine consumed on an average for each man approxi-

mately 67 minutes. The answer admitted that the travel time was at least as great as the figures given in the complaint and charged upon information and belief that it was somewhat in excess of those figures.

It was stipulated and agreed by all parties in a pretrial order entered by the District Court that the issues to be tried in the action were as follows:

"(a) What constitutes the working time which makes up the workweek of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said section, the determination of such amounts, if any, to be later referred to a special master."

"1. In reference to 'a' above, the plaintiff contends that such workweek does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places."

"2. In reference to 'a' above, the defendants contend that such workweek includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period, when they are relieved of all duties."

On January 25, 1944, the District Court entered a judgment in which it was adjudged, ordered and declared:

"1. That the Fair Labor Standards Act of 1938 does not require that there be included within the workweek of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the

mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and

"2. That plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and traveling time from the portals to their usual working places and return, as provided in the effective wage agreement and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938."

The District Court further adjudged that the defendants were entitled to recover nothing on their counterclaim for overtime compensation under the Fair Labor Standards Act and dismissed the counterclaim at the cost of the defendants.

From the judgment entered the petitioners herein took appeal on April 12th, 1944, to the United States Circuit Court of Appeals for the Fourth Circuit. That appeal is now pending, and the United States Circuit Court of Appeals for the Fourth Circuit has not given a judgment or decree, and the appeal has not been heard and submitted in that Court.

The opinion of the District Court, including findings of fact and conclusions of law, is set forth in the appendix. It is also reported in 53 Fed. Sup. 935.

STATEMENT AS TO OPERATIONS OF THE MINES.

So far as we have been able to determine there is no dispute in the evidence as to a single essential feature of the mining operations. The plaintiff operated Jewell

Ridge and Jewell Valley coal mines in the Western District of Virginia employing 500 and 400 men respectively. At Jewell Ridge when the coal is mined out under one ridge the operation follows the seam into the next ridge so that the track on which the coal is hauled to the tipple comes out of the openings in passing from ridge to ridge. These openings make convenient places of entry for some seventy-two miners who live on top of the ridges and have poor and at times impassable roads from their houses to the main portal. All other miners at Jewell Ridge and all miners at Jewell Valley enter at the mouth of the mine. Those who live in company houses walk or ride to the mine mouth as they please. Those who live a great distance are hauled free to the mine mouth in busses furnished by the company or make their own transportation arrangements.

Each underground employee carries with him into the mine his dinner and his supply of drinking water for the day. The mines have no water system. Each underground employee is required to carry an individual lamp to light his way or place in the mine. The lamps are electric battery lamps and the batteries weigh about five pounds. The light is fastened to the miner's cap and the battery to his belt.

The first thing all underground employees do upon arrival at the mine mouth is to get their lamps and batteries from the lamp house nearby. They then engage in various activities dependent upon their classification, before entering the mine.

(*a*) *Machinemen.*

Those machinemen who have motors, first get their motors out of the yard and switch them to the sand house where they fill four sand boxes holding approxi-

mately two bushels of sand, and oil the motors. They get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, including at times, rope, fingers for the starting box, and jack pipes. Those who have motors, load these supplies and equipment on to their motors. Those machinemen who do not take motors into the mine ride mantrips and load their supplies and equipment on to the tool car of the mantrip on which they ride.

(*b*) *Motormen and Brakemen.*

Motormen and brakemen go through the same process of getting oil and sand for their motors as that followed by the machinemen. Motors are brought out of the mine at the end of each shift for the purpose of being sanded, oiled and occasionally repaired.

(*c*) *Trackmen.*

Trackmen get from the blacksmith shop such tools as they may have brought out for repair. If bolts and spikes are needed, they get them in kegs weighing approximately 200 pounds and load them into the tool car on the mantrip on which they ride. Some of the trackmen take in steel cross-ties and, once or twice a month, a number of angle bars.

(*d*) *Bratticemen.*

Bratticemen carry from the supply house to the tool car on the mantrip eight or nine pounds of nails, and as needed, cement, bolts, wrenches, plaster, and rolls of brattice cloth. The latter weigh between 60 and 100 pounds.

(*e*) *Wiremen.*

Wiremen load on to the tool car each day their usual small tools, Stillson wrenches, hammers, chain blocks, "comealongs", wire splicers, drills, hack saws, hatchets, braces and bits, clip wrenches, and bell wrenches. Copper wire in lengths of 100 feet or more, blow torches and solder are taken in as needed.

(*f*) *Coal Loaders.*

The coal loaders, constituting the most numerous class of underground employees, take from the blacksmith's shop to the tool car, some four or five times a month such of their working tools as they may have brought out of the mine for repairs. Their tools consist of picks, shovels, augers, breast plates, tamping bars, wedges, axes and saws.

(*g*) *Services Continue in Transit.*

Each employee follows through to its destination, whatever he may have loaded into a tool car or on to a motor. When the tool car reaches its terminus the employee sees that his tools, equipment and supplies are unloaded and, in most instances, carries them himself to the place at which they are to be used.

THE UNDERGROUND JOURNEY.

The distances from the main portal or drift mouth to the rooms in which the coal is mined are so great that the use of mantrips to haul the men to mantrip stations is necessary to the successful operation of the mines. At Jewell Ridge, the distances from the portal to the various mantrip stations range from 4250 feet to 25,460 feet. At Jewell Valley the distances vary from 4600 to 14,450

feet. The mantrips are made up of coal cars used for hauling coal out of the mines, and are pulled by electric motors.

The mantrips are organized, operated and supervised by the company (R-225-226). They run on schedules fixed by the company (R-225). They move out on the order of company dispatchers. A foreman rides each mantrip. The men are under the control of this company foreman. He sometimes gives work instructions during the ride. He sees to it that the men sit on the side of the car away from the trolley wire. No more than seven men are allowed to ride on a car. A separate tool car is provided on each mantrip. No man is allowed to carry any tool into the car with him. The rules of the company adopted in conformity with the mining laws of the State of Virginia contain eleven separate safety rules relating to mantrips, five of which deal with the conduct of the men while on the mantrips (R-493-494). Failure to observe a rule carries a warning for the first offense, two days' layoff for the second offense and five days' layoff or discharge for the third offense (R-494).

If a man misses a mantrip, the company always provides some means for him to get to work (R-227). Furthermore, no walkways are provided along the main haulageways. The track in those haulageways is cluttered with coal.

UNDERGROUND HAZARDS.

The coal seams in the two mines vary in thickness from 32 to 54 inches. In some places the cross-collars supporting the roof are so low they scrape the coal off the cars as they are being hauled out. In places the men could ride or walk erect but, for the greater part of the ride, they sit bent over or stooped, and after leaving the

main haulageways they must, in places, bend far over or else get down on the mourner's bench of the coal car in order to avoid injuries from contact with the roof. They run the risk of falling rock or slate, of broken trolley wires, and of wrecks occurring on the mantrip.

Coal mining is a hazardous occupation (R-164). There is a greater hazard in working underground than outside (R-165). The overall picture of the dangers and the necessity for unceasing vigilance is graphically portrayed in the language of the State Mine Inspector of Virginia (R-499–503) and of the witness Tetlow (R-325–326; 359–361). Statistics for the year 1941 show that approximately one man out of every ten engaged in coal mining in the United States was injured during that year (R-333).

The District Judge found that, in view of those statistics, injuries in plaintiff's mines on mantrips were surprisingly few in number and extent. The evidence disclosed that two men had been killed, one man had received a broken back, another had received injuries to his back, while another had his ribs broken; one man had been burned by a broken trolley wire while riding a gathering motor, and four other men had received injuries. The Company kept no record of injuries unless the accident was compensable, i. e., the workman lost seven days from his work.

After leaving the mantrip at the mantrip stations, the coal loaders in Jewell Ridge pick up the powder they will need for the day, get such tools as they brought in from the outside, and carry the tools, powder, lamp, and their drinking water for the day, as they walk to their usual working places.

The distances walked vary from about 500 feet to about 1500 feet. The roof is lower than it is in the haulageways, and the workmen must walk in many places in a stooped position or all bent over (R-372). In places, the back of a man scrapes the roof as he walks and thereby wears out the top of his jacket (R-462). When a man learns to walk in that low coal, he walks with his hands as much as his feet. (R-270)

While walking in the mines, the men must be on the alert to avoid injuries from tram trips catching them in narrow places. They must also avoid contact with the exposed trolley wire. Because of this danger, a rule of the company forbids the men to carry tools on their shoulders.

The exit from the mines at the end of the shift is substantially a reverse process of the entrance into the mines. They bring to the powder station unused powder, and such tools as need repair.

The mantrips at Jewell Ridge start running at seven a. m. and follow one another not closer than 500 feet. Pay time starts at eight o'clock. At Jewell Valley the mantrip starts at seven thirty a. m. and pay time starts there at eight o'clock.

DECISION OF THE DISTRICT JUDGE.

The District Judge did not make any finding of facts contrary to the facts above enumerated. His findings include general statements, such as the following: "Employees leave the trains at the 'mantrip stations' which are nearest to their respective places of work, and walk the rest of the way."

"After securing their lamps, various men do various things before taking the mantrip. .....These

preliminary activities require variously from three to ten minutes."

CUSTOM, COLLECTIVE BARGAINING, AND ADMINISTRATIVE RULING.

The District Judge devotes more than half of his findings of fact to a discussion of these three subjects which are concerned with "face to face" method of computation. His findings omit mention of the second Illinois Agreement (Pl. Ex. #40 - R. 779-785), and the Ickes-Lewis Agreement of November 3, 1943 (Pl. Ex. #41 - R. 793-795). These two agreements recognize that coal miners are entitled to pay from portal to portal. It is also clear that during the time in question, April 1, 1943 to June 20, 1943, the miners were working pursuant to a telegram from the President of the United States (Pl. - Ex. #29 R - 708), in the expectation that any contract obtained would be retroactive to April 1, 1943.

It is not in the record, but it is a matter of common knowledge, and worthy of mention here, that on December 17, 1943, the International Union, United Mine Workers of America entered into a contract with the operators producing approximately seventy percent of the coal tonnage of America, in which it was recognized that the miners were entitled to pay from portal to portal.

QUESTIONS PRESENTED.

1. Did the District Court err in its conclusion that the Fair Labor Standards Act did not require that there be included within the work week of underground workmen in plaintiff's mines, either time spent by such employees outside the portals of the mine before entering therein, or time spent in traveling from the portals to their usual places of work and return?

2. Did the District Court err in its conclusion that plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and traveling time from the portals to their usual working places and return, as provided in the effective wage agreement and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938?

3. Did the District Court err in dismissing the counterclaim of the defendants at the costs of the defendants?

REASONS FOR GRANTING THE WRIT.

Petitioners respectfully submit that special and important reasons exist for the granting of the Writ of Certiorari herein prayed for because:

1. The public interest will be promoted by prompt settlement in this Court of the questions involved.

The mining of coal is perhaps the most essential of all industries. The entire war effort depends upon an adequate supply of coal. Approximately 500,000 men are engaged in mining coal. They have tried to make contracts with the coal operators. No general contract between the miners and coal operators, applicable to the whole industry, has been approved by the War Labor Board. Some men, but not the counsel for petitioners, refuse to admit that the decision in the Tennessee Coal, Iron and Railroad Company Case is an adequate guide to the solution of the coal problem. During the continuation of the dispute between the operators and the

miners as to whether the Fair Labor Standards Act requires portal to portal pay and the failure to obtain the execution and approval of a contract between the operators and the United Mine Workers of America, the Government has found it necessary to seize and operate the coal mines. Continued Government operation will increase the opportunities for huge claims against the Government. From the standpoint of production, of the morale of workers, of domestic tranquillity, and of the general welfare, it is highly important that this Court declare and apply to coal mines the basic principles applicable to travel from the portal to the working place and return.

2. The decision of the District Court is an unwarranted and untenable construction of an important Federal statute, in that in effect it adds as a proviso to Section 7 of the Fair Labor Standards Act the words, "unless there is a custom or contract not to pay for such overtime."

3. The District Court has restricted the scope of the Fair Labor Standards Act by determining that some of the actual hours at which an underground worker is employed and at work may be disregarded in determining the work week if there is either a custom or a contract not to pay the employee as required by the Act.

4. The District Court has made a finding of facts which show beyond all question that the underground workmen were employed or at work from portal to portal and has reached and adopted conclusions of law directly contrary to the facts so found.

5. The District Court has refused to follow an applicable decision of the United States Circuit Court of Appeals for the Fifth Circuit.

6. The District Court has attempted to draw a distinction between underground travel in ore mines and underground travel in coal mines, when the essential nature of such travel is one and the same.

CONCLUSION.

Petitioners respectfully submit that the District Court was in error in each and every particular in the judgment rendered on January 25, 1944.

For the reasons stated herein, we believe the petition for a Writ of Certiorari should be granted.

CRAMPTON HARRIS,
Birmingham, Alabama.

WELLY K. HOPKINS,
Washington, D. C.

Attorneys for Petitioners.

FRANK W. ROGERS
and
LEONARD G. MUSE
Roanoke, Va.
Of Counsel

STATE OF VIRGINIA }
CITY OF ROANOKE, } To-wit:

Crampton Harris, being first duly sworn, deposes and says that he is the attorney for the Petitioners above-named; that he helped prepare the foregoing Petition, and that the allegations thereof are true as he verily believes.

Crampton Harris
CRAMPTON HARRIS

Subscribed and sworn to before me this 5th day of May ~~April~~, 1944.

Edith Powell-Yates
Notary Public.

STATE OF VIRGINIA }
CITY OF ROANOKE } ss.

I, Crampton Harris, Attorney at Law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing Petition for Writ of Certiorari; that the same is not made for purposes of delay, and that in my opinion said Petition is meritorious and well founded in law and ought to be granted, and the Writ issued.

I further certify that I have personally given notice of the filing of the Petition, together with a copy of the Petition, supporting brief, and record, by serving copies thereof on George Richardson, Jr., Bluefield, West Virginia, and Wm. A. Stuart, Abingdon, Virginia, Counsel for Respondent.

CRAMPTON HARRIS